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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/707,156	11/06/2000	Vivian A. Schramm	MRS-015U	8663
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Michael R. Schramm 350 West 2000 South Perry, UT 84302			EXAMINER WEINSTEIN, STEVEN L.	
			ART UNIT	PAPER NUMBER
			1794	
			NOTIFICATION DATE	DELIVERY MODE
			11/06/2008	ELECTRONIC

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

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Office Action Summary

Application No.

09/707,156

Applicant(s)

SCHRAMM ET AL.

Examiner

Steven L. Weinstein

Art Unit

1794

Period for Reply -- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 20 October 2008.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-14 and 21-26 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-14 and 21-26 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. _____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO/SB/02)
- Paper No(s)/Mail Date _____
- 4) ☐ Interview Summary (PTO-413)
- Paper No(s)/Mail Date _____
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: _____

It is first noted that all of the rejections set forth below are based on the fact that this application has an effective filing date of 11/6/00. That is, the claims of the present application do not find support in any of applicants' previously filed applications, which are cited on page 2 of this pending application. This is because all of the claims in this application recite edible products, whereas none of the previously filed applications, disclosed on page 2 of this application, disclose edible products. Accordingly, Patent No. 5,246,046, patented 9/21/93, by one of the current applicants, is available prior art against the pending claims.

Claims 1-14 and 21-26 are rejected under 35 U.S.C. 112 first paragraph for containing New Matter and being based on a non-enabling disclosure. As originally disclosed, applicants' have in the container a non-liquid edible substance, a particulate substance and a candy substance wherein the non-liquid edible substance comprises either a particulate substance, or a candy powder substance, or a candy bead substance or a substantially hard candy substance, or a lollipop type candy substance or a particulate substance and a solid form substance, or a candy powder substance and lollipop type substance, and wherein the sole disclosure of the products in the container is either the lollipop or a solid particulate material, with the latter being defined in the specification as a "free flowing edible particulate matter, such as flavored candy powder, candy beads or any other particulate type edible material" (page 6, para. 1). Since the specification only discloses solid particulates, the phrase in claim 1, "free flowing edible candy material substance", is seen to be New Matter since it is readable on liquids, which phrase is not originally presented, and is set apart from the other

phrase in claim 1, "edible particulate candy substance", thus implying flowable substances other than edible particulates. This rejection is similar in substance and reasoning as the one considered by the Board of Appeals in the Board Decision of 9/23/08. Also, in claim 21, the recitation that the plug being comprised of eraser material is also seen to be New Matter. As disclosed, it is not seen that the specification is clear as to what "may be used as an eraser" (page 7, para. 2). The sentence in the specification recites that the mounting hole step is capable of enabling a user to mount holder/plug to a pencil "or the like object" and "may" be used as an eraser after using holder/plug with assembly. What may be used as an eraser? What is "or the like"? In what way is the other object "like" a pencil – e.g., size or shape or function? As broadly disclosed, the object that may be used as an eraser could be the pencil itself or an eraser could be mounted in the mounting hole of the holder/plug. The new recitation that the plug is comprised of eraser material is therefore not necessarily and inherently supported by the specification as originally filed. In claim 1, line 9, the second instance of "candy article" should read candy article substance for consistency with the claim and the specification. In fact, in regard to claim 2, it is not seen what the distinction is between the candy article substance that is a "discrete substantially spherical candy substance" and a "lollipop substance", since claim 1 defines the candy article substance as including a handle which is the basic definition of a lollipop whether a hard sugar based composition or a chocolate.

Claims 1-14 are rejected using Product Alert (3/23/98) as the primary reference. That is, claims 1-14 are rejected under 35USC103(a) as being unpatentable over

Product Alert (3/23/98), as further evidenced by Product Alert (8/9/99, part 1), Product Alert (8/9/99, part 2), Candy Warehouse (3/27/03), the references labeled exhibits A,B,D,F and G, Baker (WO 00/19803), Coleman ('884), Hoeting et al ('870) and applicants' admission of the prior art, in view of Price (3,840,678), as further evidenced by Hunter (GB ('356), Williams ('174), Ciffo (2,917,766), Schramm ('046), Martindale ('797), Kennedy ('390), Beutlich et al (GB '581), McCombs ('714), Meth ('599), Patterson ('975), Corteggiani et al (FR'917), Pilot Ink (JP'388), and McCaffery ('164).

In regard to claim 1 and in regard to the rejection employing Product Alert (3/23/98) as the primary reference, Product Alert (3/28/98), as further evidenced by Product Alert (8/9/99, part 1), Product Alert (8/9/99, part 2), Candy Warehouse (3/27/03), the references labeled exhibits A,B,D,F and G, Baker (WO 00/19803), Coleman ('884), Hoeting et al ('870), and applicants' admission of the prior art, teach it was conventional in the art to provide a flowable, particulate candy in a container and that inherently a flowable material is, of course, subject to spillage from the container, due to gravity. Product Alert (3/23/98), as further evidenced by Product Alert (8/9/99, parts 1 and 2), Baker, Coleman, Hoeting et al and applicants' admission of the prior art, all teach that it was conventional to provide a container with flowable particulate candy. Therefore, applicants are obviously not the first to provide a container with flowable candy, but like any other flowable material, the flowable candy would inherently (based on the law of gravity) be subject to spilling. See, e.g., in this regard, CandyWarehouse and Hoeting et al. Note that, although the picture is admittedly of poor quality, there is no question that CandyWarehouse shows a container containing a flowable candy

powder that is lying on its side with the powder emanating therefrom and a separate cover with a hard candy attached to the cover as described in Product Alert (3/23/98). That is, Product Alert describes a container that has a powder candy in the container, a closure that seals the container, and both a handle on one side of the closure and a hard candy lollipop on the other side of the closure which extends down into the container when the lid is in place on the container, so that the lollipop picks up some of the candy powder and when the lid is removed from the container, the candy powder coated lollipop can be licked. This product, a candy powder in a container with a lid with an attached lollipop, sold by Lucas World since at least as early as 3/23/98, has been sold unchanged, except for different label names, since then, and is the product disclosed in Product Alert (3/23/98) and Product Alert (8/9/99), parts 1 and 2, as well as CandyWarehouse and the references labeled exhibits A,B,D,F and G. Although CandyWarehouse and the exhibits either have no date or have a date later than applicants' effective filing date (except for Exhibit F which has a billing date of 10/29/99), they are only being used to put a face, if you will, on the description of the product described in Product Alert (3/23/98). Although CandyWarehouse and the references labeled exhibits A,B,D,F and G are considered further evidence of the product described in Product Alert (3/23/98), the rejection is proper even without this additional evidence, and the rejection can rely on the applied references, Product Alert (3/23/98), as further evidenced by Product Alert (8/9/99), parts 1 and 2, to teach that the recited structure of a candy powder in a container with an associated lid with attached lollipop that was capable of spilling, was prior art, conventional structure. Claim 1 differs from

the combination in the provision of a funnel to inhibit spilling. As evidenced by Price, Price discloses that the function of the funnel in a container is to prevent spillage of a flowable food substance if the container is tilted, while at the same time allowing a second edible, solid product (22) access to the flowable food substance in the container, so that some of the flowable food substance can be associated with the second edible solid product which is removably insertable through the funnel. This is precisely applicants' problem and solution; that is, employing a funnel to prevent the spillage of the contents therein, yet allowing a product or an article access to the contents. Hunter, Williams, Ciffo (2,917,766), Schramm, Martindale, Kennedy, Beutlich et al, McCombs, Meth, Patterson, Corteggiani, Pilot Ink and McCaffery are all relied on as further evidence that the art is replete with evidence that it was notoriously old in the art to provide a container with a funnel to solve the problem of preventing spillage from the container of either liquids or solids, and either edibles or inedibles, that are contained within the container. Note in this regard that the Court has noted in *In re Gorman* (18USPQ2d,1888), that "where teachings relied upon to show obviousness were repeated in a number of references, the conclusion of obviousness was strengthened". Note, for example, not only does Price teach a food in a funnel containing container to prevent spilling of the food, but so does Williams. To modify Product Alert (3/23/98) and provide a funnel for its art recognized and applicants intended function, for a product inherently known to be spillable, would have been unequivocally obvious. It is noted that this is all that the references taken as a whole have to teach to reject claim 1 (i.e., a container, a funnel and a particulate candy). This

is because claim 1 recites various contents of the container in the alternative, including, e.g., a particulate candy or a particulate candy and a candy article substance.

Therefore, the references do not have to teach a "candy article substance" with or without a handle. The same reasoning applies, e.g., to claims 2 and 5 as well. That is, since the species of candy article substance is recited in the alternative in claim 1, its further narrowing in claim 2 only further defines the alternative species. In any case, note however, that the art taken as a whole does teach it would have been obvious to include a lollipop type product on a handle that is attachable to the container as taught by Product Alert (3/29/08). For example, in regard to claim 3, as evidenced by the art taken as a whole, the funnel would inherently inhibit spillage when the container is oriented in any position. In regard to claim 4, applicants are not the first to associate a lollipop with a flowable candy in a container as evidenced by Product Alert (3/23/98) and the further evidentiary material. Product Alert (3/23/98) discloses a container containing a candy powder and a cap for the container, wherein the cap has a handle to which a lollipop is attached. The user pulls off the cap by its handle, licks the lollipop, and puts the lollipop attached to the cap, back in the container. In regard to claim 5, Product Alert (3/23/98), as further evidenced by the evidentiary material, teaches the association of a lollipop to a holder that is sealably engagable with the container is well established in the art (e.g. "resealable containers"). Claims 8-14 are rejected for the reasons given above.

Claims 1-14 are also rejected under 35 U.S.C. 103(a) using Price as the primary rejection. That is, claims 1-14 are rejected under 35USC103(a) as being unpatentable over Price (3,840,678), as further evidenced by Hunter (GB ('356), Williams ('174), Ciffo (2,917,766), Schramm ('046), Martindale ('797), Kennedy ('390), Beutlich et al (GB '581), McCombs ('714), Meth ('599), Patterson ('975), Corteggiani et al (FR'917), Pilot Ink (JP'388), and McCaffery ('164), in view of Product Alert (3/23/98), as further evidenced by Product Alert (8/9/99, part 1), Product Alert (8/9/99, part 2), Candy Warehouse (3/27/03), the references labeled exhibits A,B,D,F and G, Baker (WO 00/19803), Coleman ('884), Hoeting et al ('870), and applicants' admission of the prior art.

In regard to the rejection employing Price as the primary reference, and in regard to claim 1, Price discloses it was conventional to provide a container (10) for inhibiting the spillage of edible contents (20) of said container wherein the container defines an inner cavity and a funnel (14) extending into said inner cavity to provide communication between said cavity and the exterior of said container, and wherein said container removably contains a flowable, food substance. Price discloses that the function of the funnel is to prevent spillage of the flowable food substance if the container is tilted, while at the same time allowing a second edible, solid product (22) access to the flowable food substance in the container, so that some of the flowable food substance can be associated with the second edible solid product which is removably insertable through the funnel. This is precisely applicants' problem and solution; that is, employing a funnel

to prevent the spillage of the contents therein, yet allowing a product or an article access to the contents. Hunter, Williams, Ciffo (2,917,766), Schramm, Martindale, Kennedy, Beutlich et al, McCombs, Meth, Patterson, Corteggiani, Pilot Ink and McCaffery are all relied on as further evidence that the art is replete with evidence that it was notoriously old in the art to provide a container with a funnel to solve the problem of preventing spillage from the container of either liquids or solids, and either edibles or inedibles, that are contained within the container. Note in this regard that the Court has noted in *In re Gorman* (18USPQ2d,1888), that "where teachings relied upon to show obviousness were repeated in a number of references, the conclusion of obviousness was strengthened". Note, for example, not only does Price teach a food in a funnel containing container to prevent spilling of the food, but so does Williams. Claim 1 differs from Price, in view of the art taken as a whole, in the particular contents of the container. Claim 1 recites some type of flowable, particulate candy. As noted above, the preponderance of the evidence, taken as a whole, fairly teaches that a funnel associated with a container can prevent the spillage of any flowable product capable of spilling out of a container, whether it is a solid or liquid, or edible or inedible. Product Alert (3/23/98), as further evidenced by Product Alert (8/9/99, parts 1 and 2), Baker, Coleman, Hoeting et al and applicants' admission of the prior art, all teach that not it was conventional to provide a container with flowable candy. Therefore, applicants are obviously not the first to provide a container with flowable candy, but like any other flowable material, the flowable candy would inherently (based on the law of gravity) be subject to spilling. See, in this regard, CandyWarehouse and Hoeting et al. Note that,

although the picture is admittedly of poor quality, there is no question that CandyWarehouse shows a container containing a flowable candy powder that is lying on its side with the powder emanating therefrom and a separate cover with a hard candy attached to the cover as described in Product Alert (3/23/98). That is, Product Alert describes a container that has a powder candy in the container, a closure that seals the container, and both a handle on one side of the closure and a hard candy lollipop on the other side of the closure which extends down into the container when the lid is in place on the container, so that the lollipop picks up some of the candy powder and when the lid is removed from the container, the candy powder coated lollipop can be licked. This product, a candy powder in a container with a lid with an attached lollipop, sold by Lucas World since at least as early as 3/23/98, has been sold unchanged, except for different label names, since then, and is the product disclosed in Product Alert (3/23/98) and Product Alert (8/9/99), parts 1 and 2, as well as CandyWarehouse and the references labeled exhibits A,B,D,F and G. Although CandyWarehouse and the exhibits either have no date or have a date later than appellants' effective filing date (except for Exhibit F which has a billing date of 10/29/99), they are only being used to put a face, if you will, on the description of the product described in Product Alert (3/23/98). Although CandyWarehouse and the references labeled exhibits A,B,D,F and G are considered further evidence of the product described in Product Alert (3/23/98), the rejection is proper even without this additional evidence, and the rejection can rely on the applied references, Product Alert (3/23/98), as further evidenced by Product Alert (8/9/99), parts 1 and 2, to teach that the

recited structure of a candy powder in a container with an associated lid with attached lollipop that was capable of spilling, was prior art, conventional structure. To therefore modify Price in view of the art taken as a whole and substitute one conventional spillable, material for another conventional spillable, material, and one that is edible as well, in a container specifically designed to prevent spilling, and allow an edible to be dipped into a second edible contained in the container, is seen to have been obvious in view of the art taken as a whole. In regard to claim 3, as evidenced by the art taken as a whole, the funnel would inherently inhibit spillage when the container is oriented in any position. In regard to claim 4, the claim differs from Price in the recitation of a lollipop within the container. It is noted, in this regard, that appellants are not the first to associate a second dipposable edible with a first edible that is contained within a funnel containing container as evidenced by Price. However, appellants are also not the first to associate a lollipop with a flowable candy in a container as evidenced by Product Alert (3/23/98) and the further evidentiary material. Product Alert (3/23/98) discloses a container containing a candy powder and a cap for the container, wherein the cap has a handle to which a lollipop is attached. The user pulls off the cap by its handle, licks the lollipop, and puts the lollipop attached to the cap, back in the container. To modify the combination and add the appropriate second edible that is compatible with the first edible (in this case, a lollipop with a flowable candy) for its art recognized and applicants intended function of providing a container that does not spill the contents but allows access by the second edible to the container contents would therefore have been obvious. In regard to claim 5, Product Alert (3/23/98), as further evidenced by the

evidentiary material, teaches the association of a lollipop to a holder that is sealably engagable with the container is well established in the art (e.g. "resealable containers") and to modify the combination and provide the container with an engagable holder for its art recognized and applicants intended function would therefore have been obvious. Claims 8-14 are rejected for the reasons given above.

Claims 21-26 are rejected under 35 U.S.C. 103(a) as being unpatentable over the references as applied to claims 1-14 above in either of the orders of the references as they are applied in the two rejections, both further in view of Keeran (1,432,468) and Sanchez (5,951,184).

In regard to Claim 21, the art taken as a whole, as discussed above and previously, teaches it would have been obvious to provide a container, a funnel, an edible particulate candy substance and a candy article connected to a plug which would be capable of sealably close the container when said plug is inserted into the funnel first open end, which, after all, would define the opening of the container. Claim 21 differs from the combination in the recitation that the plug comprises eraser material. Although this recitation is seen to be New Matter for the reasons given above, nevertheless, the particular material of construction one chooses to employ for the plug or closure is seen to have been an obvious matter of choice. As evidenced by Keeran (1,432,468) and Sanchez (5,951,184), applicants are not the first to employ eraser material as the material of construction used for a closure. Both Keeran (1,432,468) and Sanchez (5,951,184) disclose containers whose closures are eraser material. To modify both combinations of references and substitute one conventional lid material for another

conventional lid material for its art recognized and presumably applicants' intended function would therefore have been obvious. In regard to claim 26, claim 26 recites that the container is capable of resembling some recognizable object. The art taken as a whole, including Baker, Ciffo and applicants' admission of the prior art, discloses that it was, of course, notoriously conventional to provide containers with an ornamental/recognizable shape and the particular shape is seen to have been an obvious matter of design. Claim 26 also recites that the plug includes a stepped opening capable of allowing a pencil to be removably insertable into the plug. Product Alert (3/23/98), as further evidenced by Product Alert (8/9/99, part 1), Product Alert (8/9/99, part 2), Candy Warehouse (3/27/03), the references labeled exhibits A,B,D,F and G, disclose a candy article connected to a plug for sealing the container but is silent as to a stepped opening for inserting an article such as a pencil therein. However, Coleman and Ciffo disclosure closures which have recesses for inserting and attaching articles thereto, and to modify the combination and employ a "stepped" recess to accommodate an article of choice would therefore have been obvious.

The remainder of the references cited on the PTO892 form are cited as pertinent art.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Steven L. Weinstein whose telephone number is 571-272-1410. The examiner can normally be reached on Monday-Friday 7:00 A.M.-2:30 P.M.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on 571-272-1398. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Steve Weinstein/
Primary Examiner, Art Unit 1794